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MS APPEAL BRIEF - PATENTS
PATENT
4035-0116P

IN THE U.S. PATENT AND TRADEMARK OFFICE

In re application of Yoshito SHIBAUCHI et al.
Before the Board of Appeals
Appeal No.:
Appl. No.: 09/675,671
Group: 1761
Filed: September 29, 2000
Examiner: L. Tran
Conf.: 3850
For: METHOD FOR PRODUCING LAMINATED CHEESE AND A
DEVICE THEREOF AND LAMINATED CHEESE FOOD THEREBY
PRODUCED

REPLY BRIEF TRANSMITTAL FORM

MS APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

October 4, 2004

Sir:

Transmitted herewith is a Reply Brief (in triplicate) on behalf of the appellants in connection with the above-identified application.

- ☐ The enclosed document is being transmitted via the Certificate of Mailing provisions of 37 C.F.R. § 1.8.

The Examiner's Answer was mailed on August 2, 2004.

- ☐ An extension of time under 37 C.F.R. § 1.136(b) to requested on and was approved on .
- ☐ Please charge Deposit Account No. 02-2448 in the amount of \$0.00. A triplicate copy of this sheet is attached.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP

By Joel M. Slattery ^{Reg No} 32,334
for James M. Slattery, #28,380

JMS/CTI/ags

P.O. Box 747
Falls Church, VA 22040-0747
(703) 205-8000

Attachment(s)



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In re application of

Before the Board of Appeals

Yoshito SHIBAUCHI et al.

Appeal No.

Appl. No.: 09/675,671

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Filed: September 29, 2000

Examiner: L. TRAN

For: METHOD FOR PRODUCING LAMINATED CHEESE AND A DEVICE
THEREOF AND LAMINATED CHEESE FOOD THEREBY PRODUCED

REPLY BRIEF

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

October 4, 2004

Sir:

This Reply Brief is respectfully submitted on behalf of Appellant in response to the newly submitted arguments of the Examiner in the Examiner's Answer dated August 2, 2004, which was issued in connection with the above-identified application. In accordance with 37 C.F.R. §1.193(b), these new points of argument are responded to in the instant Reply Brief.

New Points of Argument in the Examiner's Answer

I. Examiner Asserts that Film 10 and Gel 24 Form Part of Layers 12, 14

At page 5, line 6-11 of the Examiner's Answer, the Examiner makes the following statements:

"Mayfield discloses 'Instead of forming a film, the gelled edible material described earlier or any other suitable edible material in a liquid or gelled form may be sprayed as shown by numeral 24 on the food product 10'. Thus, film material forms a part of the layers 12, 14 and is present in layers 12, 14."

In addition, at page 6, lines 7-15 of the Examiner's Answer, the Examiner makes the following statements:

"When the film is not made and the film solution is sprayed onto the layers as shown in figure 1B, the material forms part of the layers 12, 14."

Further, at page 6, lines 7-15 of the Examiner's Answer, the Examiner makes the following statements:

"It is recognized that the films do not contain cheese; however, the external layers can contain cheese as Mayfield discloses on column 4, lines 54-57 'food product 10 may be comprised of any desired food materials' and on column 4, line 52 discloses cheese. The coating is part of the external layers. Appellant argues the external layers of Mayfield are edible film containing no cheese. The external layers of the food product disclosed in Mayfield can contain cheese as explained above. For example, the food product as shown in figure 1B contains external layers 12, 14; the coating 24 is not shown as separate layer, but as part of the external layers."

The Applicants respectfully submit that the Examiner has erroneously concluded that the film 20 and gel 24 form a part of layers 12, 14 of food product 10.

First of all, the Examiner is asked to consider that nature of layers 12, 14 of food product 10 (shown in FIGS 1A and 1B) as disclosed in Mayfield prior to wrapping or spraying either film 20 or gel 24 onto the outer surfaces of layer 12, 14. Mayfield describes each of layers 12 and 14 as being made of sticky amorphous material.

The Examiner is now directed to Mayfield FIGS. 1A and 1B, which show a food product 10 with one layer 14 on top of one layer 12. Since Mayfield describes these materials as being sticky, it is apparent that, prior to the application of film 20 or gel 24 to food product 10, that the lower surface of the one layer 14 must bond together with and stick onto the upper surface of the one layer 12 shown in FIGS. 1A and 1B.

Given the fact that material of layers 12, 14 is sticky, one can only conclude that if another food product 10 also having layers 12, 14 of sticky material were to be piled onto top of the food product 10 shown in FIGS 1B and 1A, that the lower layer 12 of this other food product 10 would bond together and stick to the upper surface of layer 12 of food product 10 shown in FIGS. 1A and 1B.

If, prior to applying film 20 or gel 24, Mayfield discloses one surface of layer 14 bonding to an adjoining layer 12, there is no reason to believe that the other surface of layer 14 would not bond to another layer 12 adjoining on the other surface.

One express purpose of the film 20 and the gel 24 of Mayfield is to prevent pairs of layers 12, 14 from sticking to each other and to other materials.

Mayfield discloses in numerous places in the description, that the film 20 and gel 24 of Mayfield are separately applied onto the layers 12, 14 of sticky food to form a coating or an outer layer separate from and covering over layers 12, 14. There is no suggestion whatsoever that film 20 or gel 24 become part of the layers 12, 14.

For example:

The Abstract recites "The edible material may be sprayed on the moist food product."

Column 3, lines 51-5 recites "FIG. 1A is a perspective view of a substantially sticky food product (layers 12, 14) being wrapped in an edible film (20)...."

Column 3, lines 56-57 recites "FIG. 1B is a perspective view of a first substantially sticky food product (layers 12, 14) sprayed with a substantially non-sticky edible material (24)...."

Column 4, lines 2-3 recites "an edible film is made by mixing 1.5 to 3.0 teaspoons of a gelling substance such as gelatin, pectin. or agar to 1.5 cups of purified water to form a solution."

Column 4, lines 17-18 recites "The gelled solution is dried in the container, forming an edible film."

Column 4, lines 21-22 recites "After the gelled solution is dry and a relatively strong paper-thin film is formed...."

Column 4, lines 28-34 recites "Alternatively, other edible films having enhanced impermeability properties may be used. The edible film is preferably clear, odorless and tasteless. The film is cut into usable slices for wrapping the desired food products. Such a film does not appreciably alter the texture or the taste of food products wrapped in such film. Food products containing an outer layer of such edible film can be handled with greater ease...."

Column 5, lines 14-17 recites "Any suitable method to spray or apply the edible material on any desired food product may be utilized...."

Column 6, lines 50-54 recites "An edible film is formed directly on the food by spraying a liquid or an atomized liquid on the food. The sprayed liquid is dried, leaving the food coated in an edible film."

Column 7, lines 56-59 recites "An example of using an edible film as a moisture barrier is with a cheese and cracker sandwich, where the edible film provides a moisture barrier between the cheese and the crackers, preventing sogginess and/or staleness of the cracker."

Given the ample disclosure in the Mayfield specification that the film 20 and gel 24 of Mayfield are separately applied to layers 12, 14 and form a coating or an outer layer on layers 12, 14, the coating and the outer layer functioning as a moisture barrier between adjoining food products, it is impossible for one skilled in the art to conclude that a layer 12 (or 14) of one food product to make contact with a layer 14 (or 12) of an adjoining food product as the Examiner asserts.

Therefore, since neither gel 24 nor film 20 forms a part of the layers 12, 14, the Applicants respectfully submit that the Examiner's conclusion that Mayfield's layer 12 (or 14) of one food product makes contact with a layer 14 (or 12) of an adjoining food product is improper. Mayfield explicitly teaches outer surfaces of layers 12, 14 being coated with an outer layer of gel 24 or film 20.

II. Considered in Its Entirety, Mayfield Fails to Suggest that Film 10 and Gel 24 Have Different Properties or Perform Different Functions When Applied onto Outer Surfaces of Layers 12, 14

Mayfield FIGS. 1A and 1B merely show different embodiments of applying a coating or an outer layer to the outer surfaces of the substantially sticky layers 12 and 14 of the moist and amorphous food product 10.

Despite the mention at Mayfield, column 5, lines 11-14 or "Instead of forming a film, the gelled edible material described earlier or any other suitable edible material in a liquid or gelled form may be sprayed as shown by numeral 24 on the food product 10", the Applicants submit that if one skilled in the art at the time the invention was made were to consider the whole of Mayfield in its entirety, this person skilled in the art would only conclude that film 20 and gel 24 have the same properties when dried and applied to layers 12, 14, and thus perform the same function when applied to or coated on these sticky, amorphous layers 12, 14 of Mayfield.

For example,

Column 4, lines 17-18 of Mayfield recites "The gelled solution is dried in the container, forming an edible film."

Column 4, lines 21-22 recites "After the gelled solution is dry and a relatively strong paper-thin film is formed...."

Column 4, lines 28-30 recites "Alternatively, other edible films having enhanced impermeability properties may be used."

Column 6, lines 12-13 recite "The edible film is used as a moisture barrier between a moist food and a dry food."

Column 6, lines 50-54 recite "An edible film is formed directly on the food by spraying a liquid or an atomized liquid on the food. The sprayed liquid is dried, leaving the food coated in an edible film."

Column 7, lines 56-59 recite "An example of using an edible film as a moisture barrier is with a cheese and cracker sandwich, where the edible film provides a moisture barrier between the cheese and the crackers, preventing sogginess and/or staleness of the cracker."

The Applicants respectfully submit that Mayfield's film 20 is merely the gelatinous material, which is dried into a film and then wrapped around one food product 10 (consisting of sticky layers 12 and 14), in order to form a separate impermeable outer layer (or coating) between an adjoining food product 10.

Similarly, gel 24 is merely the gelatinous material in liquid form, the gel 24 being sprayed onto the layers 12, 14, and then dried to form an outer layer between a layer 12(or 14) of one food products 10 and a layer 14 (or 12) of an adjoining food product 10, thereby forming a separate, dry impermeable film (or coating) between the adjoining food products 10.

From the above, it is apparent that the Mayfield film 20 is formed from the gel, the film 20 merely being a dried form of the gel.

Common Dictionary definitions of the word film include: "a thin layer or coating" and "a thin membrane or thin skin". Each of these definitions imply that a film is impermeable, and as such, is a moisture barrier.

Given the common definition of "film", one can only conclude that the gel 24 (once dried into a film) and the film 20 (gel which is dried prior to wrapping) are both impermeable, and both act as moisture barriers between the sticky layers of adjoining amorphous food products 10.

The Examiner will note that Mayfield teaches that food product 10 (optionally containing cheese) does not have impermeability, and thus cannot act as a dry moisture barrier between itself and other materials. If the sticky, amorphous food product 10 (optionally being cheese) disclosed by Mayfield were in fact both dry and having impermeability with respect to an adjoining material, there would no need in Mayfield for either film 20 or gel 24. Mayfield teaches that each of film 20 and gel 24 act as a separate layer between the amorphous layer 12 (or 14) of one food product

and layer 14 (or 12) of an adjoining food product 10 specifically for the purpose of providing a moisture barrier.

In summary,

1. since the Mayfield food product 10 (optionally containing cheese) does not have impermeability, and
2. since both of film 20 (which is formed from the gel) and gel 24 (which dries into a film) of Mayfield are dry and impermeable, and therefore, act as barriers to moisture,

the Applicants respectfully submit that it is improper for the Examiner to conclude that layers 12, 14 can both contain cheese, and at the same time be impermeable.

Moreover, the Examiner admits that "slices of cheese have a moist surface" at page 7, line 6.

III. Examiner Asserts there is No Recitation of External Layer to External Layer

Contact in the Present Application

At page 6, lines 17-21 of the Examiner's Answer, the Examiner makes the following statements:

"Appellant argues there is no external layer to external layer contact of layers containing cheese. The claims do not recite an external layer to external layer contact of layers containing cheese; the claims require only that the layers have inherent releasability. As shown above, the food products in Mayfield do have inherent releasability. There is no recitation of direct external layer to external layer contact."

The Applicants respectfully disagree with the Examiner's assertion that, "There is no recitation of direct external layer to external layer contact", for example.

The Examiner is directed to independent claim 12, which recites:

a multilayer structure produced by piling a plurality of laminated cheese foods, each of said plurality of laminated cheese foods of the multilayer structure having at least three layers, the at least three layers including:

two external layers of platy food material containing cheese, and having inherent releasability from external layers of adjoining ones of the plurality of laminated cheese foods when piled; and

an intermediate layer of platy food material, wherein the intermediate layer may be formed of a plurality of intermediate layers of platy food material which inherently bond together, the intermediate layer being disposed between and being inherently capable of bonding to the two external layers of platy food material,

wherein each of the plurality of laminated cheese foods of the multilayer structure is releasable from the adjoining ones of the plurality of laminated cheese foods of the multilayer structure.

See also FIG. 7 of the present application, which clearly shows direct external layer to external layer contact between external layer (A) of one cheese food and external layer (B) of an adjoining cheese food.

Moreover, common Dictionary definitions of the claimed word "External" include "pertaining to the outside or outer part", and "external surface".

At page 6, line 15 of the Examiner's Answer, the Examiner asserts that the present applicants have not explicitly exclude additional material. The Applicants respectfully disagree. By definition, the claimed external layers (A)(B) must be considered the form the "external surfaces" of each of the claimed laminated cheese foods. The mere fact of claiming layers (A)(B) as external layers excludes the possibility of any other material being added thereon.

Moreover, the Applicants respectfully submit that "piling a plurality of laminated cheese foods in a multiplayer structure", as set forth in claim 12 and shown in FIG. 7 of the present application, explicitly describes and shows "direct external layer to external layer contact". Further, if each of the laminated cheese foods are piled one atop another, the external surfaces of the laminated cheese food certainly do make direct contact with each other. Nowhere in the present specification is there any hint that the "external layers of adjoining laminated cheese foods" of the present invention are separated by any other material.

By contrast, as discussed above, the Mayfield layers 12, 14 are coated or covered with an outer layer (20, 24). Thus, layer 12 (or 14) of one food product 10 is separate from and cannot make direct contact with layer 14 (or 12) of an adjoining food product 10.

At page 7, lines 6-8, the Examiner states:

"For instance, a commercially available package of cheese containing multiple slices can easily be separated". However, the Applicants insist

that such a commercially available package does not teach or suggest the present invention, nor is such a commercially available package what is taught by Mayfield."

As best understood by the Applicants, such a commercially available and conventional package with releasable slices, merely includes a pile of cheese slices with each slice merely consisting of only one material, not the three layers (A)(C)(B), as presently claimed.

The present application claims an intermediate layer (B), two external layers, (A)(B), with the resulting laminated cheese foods being piled on each other. Each external layer (A)(or B) is formed so as to be releasable from an adjoining external layer (B) (or A), but not releasable from an adjoining intermediate layer (C).

The conventional commercially available packages do not teach or suggest this. Moreover, the Examiner has conceded at page 7, line 6 that"....slices of cheese have a moist surface..."

If the Examiner concedes that layers 12, 14 of Mayfield have moist surfaces which touch layers 12, 14 of adjoining food products 10, she cannot at the same time believe that these layers 12, 14 can function as a moisture barrier between layers 12, 14, as required by Mayfield. Mayfield explicitly discloses that the film 20 or gel 24 wrapped around or coated onto the external surfaces of the layers 12, 14, thus providing a moisture barrier between the layer 12, 14. As such, it is film 20 or gel 24 (not layers 12, 14) which forms the external surfaces of Mayfield food product 10.

In view of the arguments above, the Applicants respectfully submit the new point of argument by the Examiner have been overcome.

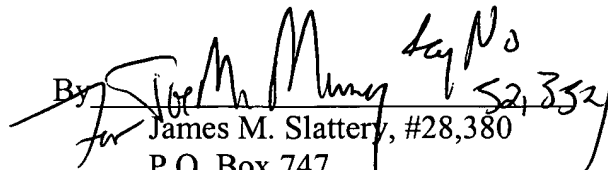
Conclusion

Based on the above considerations, the Appellant accordingly continues to maintain that the Examiner's prior art rejections as set forth in the final Office Action remain improper, both in fact and in law. The Examiner's new points of arguments have not changed this position. The Appellant therefore respectfully requests the Board of Appeals reverse the Examiner's final rejections of the appealed claims and render a decision favorable to the Appellant.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP

By  ^{by No} 52,352
James M. Slattery, #28,380
P.O. Box 747
Falls Church, VA 22040-0747
(703) 205-8000

JMS/CTT/ags
4035-0116P